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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1952

No. 152

MONDAKOTA GAS COMPANY, a corporation,

Petitioner,

vs.

MONTANA-DAKOTA UTILITIES CO., a corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Mondakota Gas Company, a corporation, petitioner, prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit dismissing petitioner's appeal on February 25, 1952.

Opinion Below.

The order dismissing the appeal is reported in 194 F. 2d 705.

Jurisdiction.

The judgment of the Court of Appeals was entered on February 25, 1952 [R. 81][1] and Petition for Rehearing was denied on April 2, 1952. [R. 123.] The jurisdiction of this court is invoked under 28 U. S. C. A., Section 1254(1).

[1]All references to record are to pages of the printed transcript of the record.

Question Presented.

Whether the Court of Appeals for the Ninth Circuit was without jurisdiction and powerless to hear the appeal of a 30-million dollar lawsuit by reason of the fact that a $5 filing fee did not accompany the filing of the formal Notice of Appeal, the following events, however, having occurred within the 30-day statutory appeal period:

a. The clerk of the District Court received from petitioner (appellant) a formal Notice of Appeal twenty-two days after entry of judgment.

b. The Clerk retained the Notice of Appeal but did not mark it filed until he received a $5 filing fee, which was received by the clerk on the thirty-fourth day.

c. However, on the *thirtieth* day the clerk received from petitioner and *filed* a document designated "Statement of Points on Which Appellant Intends to Rely and Designation of Record Necessary for Consideration Thereof" which document contained the information required of a formal Notice of Appeal.

d. Both aforementioned documents were served on respondent within the thirty-day statutory appeal period.

Statutes Involved.

28 U. S. C., Section 1914 and Judicial Conference Schedule of Additional Fees;

28 U. S. C., Section 1917;

28 U. S. C., Section 2107;

Federal Rules of Civil Procedure, Nos. 1, 61, 73(a) and 73(b).

Said statutes and rules are printed in Appendix A, *infra,* pages 1-6.

Statement of Facts.

In 1949, petitioner filed a complaint in the District Court of the United States, District of Montana, for thirty million dollars as treble damages under the Natural Gas Act, the Antitrust Law and the Leasing Act. [R. 1-12.] After filing an answer [R. 13-21], respondent moved for summary judgment. [R. 22, 23.] The District Court, having taken the motion under submission for over a year, rendered an opinion granting the motion on November 1, 1951. [R. 23-33.] Judgment of dismissal was filed and entered November 8, 1951. [R. 33.] In the District Court's opinion it is stated:

> "It would seem apparent that the vital questions presented in this case need the consideration of a tribunal having finality of decision before the parties enter upon a limitless field of litigation and expense." [R. 27.]

From the judgment entered November 8, 1951, petitioner did the following in an effort to perfect its appeal:

On November 29, 1951, a formal Notice of Appeal was sent via air mail by petitioner in Los Angeles, California, to the clerk of the District Court at Great Falls, Montana, for filing. [R. 34.] The clerk received this notice on or about December 1, 1951 [R. 60], or on December 3, 1951. [R. 48.]

On December 3, 1951, the clerk wrote via ordinary mail to counsel for petitioner at Los Angeles that the notice of appeal would not be filed until a $5 filing fee had been received. [R. 41.] Because there is no direct train service between Great Falls, Montana and Los Angeles, this letter did not reach petitioner at Los Angeles until

December 10, 1951. [R. 38, 41.] Thereupon, a check for $5 filing fee was immediately forwarded by petitioner via air mail to the clerk at Great Falls, Montana [R. 38, 41, 42], and was received by the clerk on December 12, 1951. [R. 48.]

Between December 1st and 3rd and December 12th (the statutory appeal period having expired on December 8th), the clerk had retained custody of the "Notice of Appeal," but did not mark it "filed" until he received the $5 fee on December 12.

On *December 8, 1951,* the last day of the thirty-day appeal period, *the clerk* of the District Court received from petitioner and *"filed"* [R. 68, 77] a document entitled Statement of Points on Which Appellant Intends to Rely and Designation of Record Necessary for Consideration Thereof. [R. 54-56.]

In addition to the foregoing, an appeal bond was actually deposited with the clerk within the thirty-day appeal period. [R. 41.]

For reasons unknown to petitioner the clerk did not act with prudence in advising petitioner of the fee via ordinary mail instead of by air mail, when such an important short period of time was left. [R. 68, 47, 48, 70, 71, 73, 74.] Had air mail been used, the $5 filing fee could easily have been paid on or before December 8, 1951, the last day of the appeal period. Further, the clerk notified local counsel for respondent in Billings, Montana, of the $5 requirement, *but did not notify local counsel for peti-*

tioner in Helena, Montana. [R. 73.] Even by ordinary mail, local counsel for petitioner would have received notification in ample time to have paid the fee by December 8, 1951. [R. 74.] Within the thirty-day appeal period, respondent was served with copies of the Notice of Appeal and the Statement of Points. At all times, respondent was on notice that an appeal was intended and could not have been in any way prejudiced or misled. [R. 38, 39, 68, 57.] Respondent participated in perfecting the record on appeal.[2]

Counsel for petitioner acted in good faith in forwarding the Notice of Appeal to the clerk without accompanying it with a $5 filing fee. *He was misled, however, by an inconsistent statute relating to filing fees.* 28 U. S. C. A., Section 1914, provides in effect that no such fee

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[2]On December 7, 1951, counsel for respondent requested counsel for petitoner to give respondent additional time within which it might serve and file a designation of additional portions of the record on appeal. [R. 68, 69.] A formal written stipulation was signed by counsel for respondent and petitioner on December 8, 1951. [R. 72.] By such stipulation respondent was given until January 18, 1952, within which to designate its additional record. By written motion dated December 13, 1951, filed December 17, 1951, respondent moved the District Court to extend and enlarge the time within which respondent might serve and file designation of additional appeal record. [R. 58.] Pursuant to respondent's motion the District Court Judge on December 17, 1951, ordered that respondent was granted until January 18, 1952, in which to serve and file its designation of additional record on appeal. [R. 59.] On January 16, 1952, respondent filed a designation of additional record. [R. 77.] In that document respondent offered to stipulate that all exhibits to affidavits and depositions be transmitted to the Court of Appeals for its consideration. Thereafter, petitioner filed a supplemental designation of record on appeal and stipulated with respondent that the clerk of the District Court should transmit to the Appellate Court the original papers designated by respondent in lieu of copies. [R. 52.]

is payable. Counsel for petitioner relied thereon. Another statute, 28 U. S. C. A., Section 1917, on the other hand, provides upon filing a notice of appeal a $5 filing fee is payable. [R. 69, 70.]

After all of the foregoing occurred petitioner made a motion in the District Court for a *nunc pro tunc* order to mark the Notice of Appeal filed as of the date it was actually received, rather than as of the date the clerk received the $5 fee. [R. 35.] This motion was denied, among other things the District Court Judge stating that this issue would be presented on motion to the Court of Appeals at a hearing to be had in the near future. [R. 49-51.] Thereafter, respondent's motion to dismiss the appeal was filed with the Court of Appeals for the Ninth Circuit, hearing was had and the order dismissing the appeal was made on February 25, 1952. [R. 79-81.] A petition for rehearing was timely filed on March 17, 1952 [R. 82], and it was denied on April 2, 1952. [R. 123.] Many of the foregoing pertinent facts are not recited in the order dismissing the appeal. [R. 79, 80.]

Specifications of Error to Be Urged.

The Court of Appeals of the Ninth Circuit erred:

1. In holding that there was no jurisdiction over the appeal.

2. In holding that the document designated "Statement of Points on Which Appellant Intends to Rely" which was actually filed on December 8, 1951, was not in substance a notice of appeal that met the jurisdictional requirement.

Reasons for Granting the Writ.

1. *The decision conflicts with applicable decisions of the Supreme Court of the United States and legal principles announced therein:*

a. Because petitioner had on file within the thirty day statutory appeal period a document or documents from which it was apparent petitioner intended to appeal and respondent had notice thereof, the decision conflicts with *Georgia Hardwood Lumber Co. v. Compania de Navegacion, etc.*, 323 U. S. 334 at 336-337.

b. Because the $5 filing fee was delayed in payment as a result of petitioner having relied on an inconsistent statute relating to filing fees, the decision ignores the legal principle stated in *Reconstruction Finance Corp. v. Prudence Securities Advisory Group*, 311 U. S. 579, 582.

2. *The decision conflicts with decisions of the Court of Appeals of another circuit:*

a. *Crump v. Hill*, 104 F. 2d 36 (C. A. 5);

b. *Compania de Navegacion, etc. v. Georgia Hardwood Lumber Co.*, 141 F. 2d 652 at 655 (C. A. 5).

3. *The Court of Appeals ignored the provisions of Federal Rules of Civil Procedure Nos. 1, 61, 73(a) and 73(b), and the general principle that statutes giving right of appeal should be liberally construed, and its decisions in dismissing this appeal.*

a. *Cutting v. Bullerdick*, 178 F. 2d 774, 776.

b. *St. Marie v. United States*, 108 F. 2d 876, 879.

4. *The Court of Appeals for the Ninth Circuit by ordering the appeal dismissed in view of the circumstances*

of this case has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. This should be done to correct a travesty on justice.

Discussion of Foregoing Reasons.

1. The Court of Appeals in its order dismissing the appeal cites cases in support which if examined in light of the facts of this case are not in point. If the facts of the present case had been set forth in the opinion and order of dismissal below, the decision would be a deviation from the decision of the United States Supreme Court in *Reconstruction Finance Corp. v. Prudence Securities Advisory Group, supra,* 311 U. S. 579. The Court of Appeals in its opinion made no reference whatever to the absolute inconsistency between 28 U. S. C., Section 1914 (28 U. S. C. A., Sec. 1914), and the fact that petitioner had relied thereon inadvertently in not sending to the clerk a $5 filing fee along with the formal Notice of Appeal. The direct effect of that statute is that such a filing fee was not due. The formal Notice of Appeal was received by the clerk at least five days before the thirty day statutory period expired. By use of ordinary mail between Great Falls, Montana, and Los Angeles the clerk sent a letter notifying counsel for petitioner that the Notice of Appeal would not be "filed" until the $5 fee was received. This letter was received on December 10, 1951, two days after the thirty-day period. Immediately the $5 filing fee was forwarded to the clerk which he received on December 12, 1951, and at that time marked "filed" the Notice of Appeal which he had been holding since December 1, or December 3, 1951. The inconsistent statute which appears thirty-three pages further on

in the United States Code Annotated is 28 U. S. C. A., Section 1917 (28 U. S. C., Sec. 1917). However, *on December 8, 1951, the last day within which a notice of appeal could be filed, the clerk did file what was in substance a notice of appeal,* that is, "Appellant's Statement of Points on Which Appellant Intends to Rely and Designation of Record Necessary for Consideration Thereof." [R. 54-56.] An examination of this document, filed on time, shows that it, in substance, contains the necessary elements of a notice of appeal, at least sufficient to satisfy the jurisdictional requirement. In view of the foregoing facts, the Court of Appeals decision directly conflicts with the language of the Supreme Court of the United States in *Reconstruction Finance Corp. v. Prudence Securities Advisory Group, supra,* 311 U. S. 579 at 582, where it is said:

> "Ambiguities in statutory language should not be resolved so as to imperil a substantial right which has been granted. * * *
>
> "The procedure followed by petitioners was irregular. Normally the Circuit Court of Appeals would be wholly justified in treating the mere filing of a notice of appeal in the District Court as insufficient. *But the defect is not jurisdictional* in the sense that it deprives the court of power to allow the appeal. The court has discretion, where the scope of review is not affected, to disregard such an irregularity in the interests of substantial justice. (*Cf., Taylor v. Voss,* 271 U. S. 176, 70 L. Ed. 889, 46 S. Ct. 461, 7 Am. Bankr. Rep. (N. S.) 706, dealing with appeals and petitions for revision under earlier provisions of the Act. In this case the effect of the procedural irregularity was not substantial. The scope of review was not altered. There was no question of the good faith of petitioners, of dilatory tactics, or of frivolous ap-

peals. Hence it would be extremely harsh to hold that petitioners were deprived of their right to have the court exercise its discretion on the allowance of their appeals by reason of their erroneous reliance upon the permanency of *London v. O'Dougherty* (C. C. A. 2d), 102 Fed. 2d 524, 39 Am. Bankr. Rep. (N. S.) 337, *supra.* * * * The failure to comply with statutory requirements, however, is not necessarily a jurisdictional defect. (*Cf. Alaska Packers Asso. v. Pillsbury,* 301 U. S. 174, 81 L. Ed. 988, 57 S. Ct. 682.)"

The decision is also in conflict with the decision of United States Supreme Court in *Georgia Hardwood Lumber Co. v. Compania de Navegacion, etc.,* 323 U. S. 334 at 336, where the court said:

> *"The intention to appeal was apparent.* Only a formal request was lacking."

In other comparable instances the Supreme Court has held that the scope of review was not affected by such an irregularity and disregarded the same in the interest of justice. In *Taylor v. Voss,* 271 U. S. 176 at 182, the Supreme Court held that where an "application for an allowance of an appeal" was *required* by the statute that the court in the interests of justice treated the "Notice of Appeal" as such an application. For the moment, disregarding the formal Notice of Appeal, those legal principles should apply here. "Appellant's Statement of Points on Which Appellant Intends to Rely and Designation of Record Necessary for Consideration of the Appeal," filed within the statutory period and from which "the intention to appeal was apparent," should have been sustained as a sufficient notice of appeal at least to satisfy the jurisdictional requirements.

2. The decision also is in conflict with two decisions of another Court of Appeals: *Compania de Navegacion etc. v. Georgia Hardwood Lumber Co.*, 141 F. 2d 652, at 655 (C. A. 5); *Crump v. Hill*, 104 F. 2d 36 (C. A. 5). In *Crump v. Hill* no notice of appeal was filed within the statutory period but within the period appellant did file a designation of record on appeal and an acknowledgment that appellee had waived formal notice of appeal. A motion was there made to dismiss the appeal because a formal notice of appeal was not filed within the thirty-day period. Appellant contended that the designation of record on appeal, together with acknowledgment of waiver by appellee, satisfied the jurisdictional requirement of filing a notice of appeal. The court said:

> "(1) We agree with appellant. It is true that Rule 73 does specifically provide that the only thing necessary to be done to perfect an appeal is to file notice thereof with the Clerk, making it the duty of the Clerk to see that notice thereof is served, and that a literal compliance with the Rule requires timely filing of the notice with the Clerk. The reason for the Rule, however, to set the appeal in motion by mere notice without judicial action, makes it quite clear we think that the appellant, when he procured from appellee and filed, her waiver of notice, her acceptance of designation, and her entry of appearance, just as effectively started his appeal as if he had merely filed the notice of appeal with, and left its service to, the Clerk. It is true enough that the starting of an appeal within the time fixed is jurisdictional and that good practice requires conformity to the formal requirements of the Rule. *But it*

> *would, we think, be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the Rule is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights.*" (104 F. 2d at 37. Emphasis added.)

In its decision dismissing the appeal the Court of Appeals for the Ninth Circuit attempted to distinguish *Crump v. Hill,* 104 F. 2d 36, by stating, "We find no such special circumstances here as appear in Crump v. Hill." This statement *ignores the facts* of this case and is *not fair to petitioner.* This was called to the attention of the Court of Appeals for the Ninth Circuit in appellant's Petition for Rehearing [R. 82, 93] where a chronological analysis is set forth showing that the special circumstances of this case far exceeded any of the efforts made in *Crump v. Hill* to perfect an appeal.

3. Also the decision of this case in view of the facts conflicts with the Ninth Circuit's own decision in the case of *Cutting v. Bullerdick,* 178 F. 2d 774, 776, where the court relied on the rules of *Reconstruction Finance Corp. v. Prudence Securities Advisory Group, supra,* 311 U. S. 579, and *Georgia Hardwood Lumber Co. v. Compania de Navegacion etc., supra,* 323 U. S. 334, at 336, and stated, "The intention to appeal was apparent. * * * The rule of strict construction does not apply to the acquiring of jurisdiction by an Appellate Court." Directly contrary thereto such rule of strict construction was here applied.

Also it ignored its prior decision in *St. Marie v. United States,* 108 F. 2d 876, 879, where it said: "It is apparent that the notice of appeal was effectually given, which after all is the purpose of the rule. (Rule 73(a).)"

4. In addition to the foregoing the Court of Appeals refused to give effect to the provisions of Federal Rules of Civil Procedure, Sections 1, 61 and 73(a), and also ignored the general rule that statutes giving the right of appeal are to be liberally construed in furtherance of justice. Obviously after the document which was in substance a notice of appeal was filed with the clerk of the court within the statutory period, the excusably delayed paying of the $5 filing fee thereafter was at most a procedural irregularity and did not affect the jurisdiction of the Appellate Court or the validity of the appeal. Rule 1 provides that the rules "shall be construed to secure the just, speedy and inexpensive determination of every action," and Rule 61 provides in part the court "at every stage of the proceeding *must* disregard every error or defect in the proceeding which does not affect the substantial rights of the parties" and Rule 73(a) provides "the failure of the appellant to take any of the further steps to secure a review of the judgment appealed from does not affect the validity of the appeal."[3] (*St. Marie v. United States, supra,* 108 F. 2d 876, 879.)

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[3]If Designation of Record and Points on Appeal which was in fact filed by the clerk within the statutory period be deemed an adequate Notice of Appeal (*Crump v. Hill,* 104 F. 2d 36, 37), then under Rule 73(a) the delayed payment of the $5 fee was only procedural and did not affect the validity of the appeal.

5. A travesty on justice has occurred. The action involved very important questions of law and millions of dollars and the trial court, in effect, ordered a dismissal judgment to be entered before trial so that important legal questions could be first determined on appeal. The action was filed as a direct result of the protracted litigation that had theretofore taken place in the case of *Montana-Dakota Utilities Co., petitioner, v. Federal Power Commission, Mondakota Gas Co., et al., respondents,* reported in 169 F. 2d 392, cert. den. 335 U. S. 853. As shown above petitioner and its counsel in good faith took steps to perfect its appeal and did so in the usual and normal manner. However, because of reliance on an inconsistent statute, a $5 filing fee was delayed in payment. Nevertheless, there was on file within the thirty-day statutory period, a document or documents which were in substance at least a notice of appeal and from which it was obvious that petitioner was intending to appeal. This was confirmed by the fact that respondent after receiving copies of said documents and within the thirty-day appeal period, stipulated with petitioner respecting the record on appeal. Petitioner submits the juirsdictional requirement was met. Under the circumstances the Court of Appeals for the Ninth Circuit by the order of dismissal entered in this action has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. This can only be done and the miscarriage of justice averted by granting the writ of certiorari in this case.

Conclusion.

For the foregoing reasons this petition for writ of certiorari should be granted. Assuming that the Court of Appeals has discretion to dismiss an appeal for procedural irregularities in paying filing fees, the Court below did not exercise its discretion. It believed it had no jurisdiction to hear the appeal at all. At the very least, therefore, this petition should be granted and the case remanded to the Court of Appeals for further consideration.

Respectfully submitted,

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APPENDIX "A."

28 USC §1914:

§1914. District court; filing and miscellaneous fees; rules of court.

(a) The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $15, except that on application for a writ of habeas corpus the filing fee shall be $5.

(b) The clerk shall collect from the parties such additional fees only as are prescribed by the Judicial Conference of the United States.

(c) Each district court by rule or standing order may require advance payment of fees.

(d) This section shall not apply to the District of Columbia.

JUDICIAL CONFERENCE SCHEDULE OF ADDITIONAL FEES.

The Judicial Conference, acting under the authority of provisions of this section, prescribed the following schedule of additional fees, effective January 1, 1946, except that no fees were to be charged for services performed on behalf of the United States:

"1. For filing and indexing any paper, not in a case or proceeding, 25 cents.

"2. For making a copy (except a photographic reproduction) of any record or paper, and comparison thereof, except a copy of a writ for service on a party in a suit or action covered in section 2 of the Act entitled 'An

Act to provide fees to be charged by clerks of the district courts of the United States,' approved February 11, 1925, as amended by the Act approved September 27, 1944, (58 Stat. 743, 28 U. S. C. Supp. IV, sec. 549), 40 cents per page of 250 words or fraction thereof; for comparing for certification a copy (except a photographic reproduction) of any transcript of record, entry, record or paper, except a copy of a writ for service on a party in a suit or action covered in said section 2, when such copy is furnished by the person requesting its certification, 10 cents for each page of 250 words or fraction thereof.

"For a photographic reproduction of any record or paper, and the comparison thereof, 25 cents for each page; and for comparing with the original thereof any photographic reproduction of any record or paper not made by the clerk, 5 cents for each page.

"3. For filing a praecipe or requisition for and certifying the result of a search of the records of the court for judgments, decrees, other instruments, suits pending, and bankruptcy proceedings, 50 cents for each name.

"4. For preparation and mailing notices in bankruptcy 10 cents each for the first 20 notices and 5 cents for each additional notice; Provided, That this fee shall cover and include all services and expenses in connection therewith: And provided further, That such fee shall not be deemed to be included in any other fee for services in bankruptcy proceedings.

"5. For admission of attorneys to practice, $2.00 each. This fee shall include a certificate of admission."

28 USC §1917:

§1917. District Courts; fee on filing notice of or petition for appeal.

Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or of a writ of certiorari $5 shall be paid to the clerk of the district court, by the appellant or petitioner.

28 USC §2107:

§2107. Time for appeal to court of appeals.

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon the showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11.

Federal Rules of Civil Procedure.

Rule 1. Scope of Rules.

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 61. Harmless Error.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 73. Appeal to a Court of Appeals.

(a) *When and How Taken.* When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall

be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. *Failure of the Appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies* as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

(b) *Notice of Appeal.* The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to all the parties to the judgment other than the party or parties taking the appeal, but his failure so to do does not affect the validity of the appeal. The notification to a party shall be given by mailing a copy of the notice of appeal to his attorney of record or, if the party is not represented by an attorney, then to the party at his last known address, and such notification is sufficient notwithstanding the death of the party or of his attorney prior to the giving of the notification. The clerk shall note in the civil docket the names of the parties to whom he mails the copies, with date of mailing.

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In the
Supreme Court of the United States

October Term, 1952

No. ———

MONDAKOTA GAS COMPANY, a corporation,
Petitioner,

vs.

MONTANA-DAKOTA UTILITIES CO., a corporation,
Respondent.

BRIEF OF RESPONDENT, MONTANA-DAKOTA UTILITIES CO. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit dismissing the appeal is reported in 194 F. (2d) 705.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals for the Ninth Circuit properly dismissed petitioner's appeal where it appears that petitioner's Notice of Appeal was not filed in the

office of the Clerk of the District Court until forty-two days after the District Court rendered its Opinion and Order and thirty-four days after the judgment was entered, and where no extension of time had been obtained by petitioner.

STATUTES INVOLVED

28 U. S. C. Section 2107;
28 U. S. C., Section 1917;
Federal Rules of Civil Procedure, 73(a), 73(b) and 73 (g).

STATEMENT

On November 1, 1951, the United States District Court for the District of Montana entered its order granting respondent's motion for summary judgment (R. 23) (respondent contended in the Court below that this was the judgment of the court from which appeal should be taken). On November 8, 1951, a formal judgment of dismissal was entered in the District Court (R. 33).

On December 3, 1951, the Clerk of the District Court at Great Falls, Montana, received from petitioner's Los Angeles counsel a notice of appeal, which was not accompanied by the filing fee of $5.00 (R. 48). Apparently no copy of this letter was sent to petitioner's co-counsel at Helena, Montana (R. 40). The Clerk immediately, on December 3, 1951, wrote to petitioner's Los Angeles counsel advising that the notice of appeal would be filed when the filing fee was paid (R. 46). The Clerk had no other communication of any kind from petitioner respecting the notice of appeal until he received the filing fee on December 12, 1951, and on that day filed the notice of appeal (R. 42, 46, 48). In the meantime, on December 8, 1951, the Clerk had received and filed peti-

tioner's Statement of Points on Which Appellant Intends to Rely and Designation of Record Necessary for Consideration Thereof (R. 54).

On January 25, 1952, the District Court denied petitioner's motion for an order directing the Clerk to file the notice of appeal nunc pro tunc as of December 3, 1951, rather than December 12, 1951 (R. 49). No appeal has been taken by petitioner from this order.

On January 24, 1952, respondent moved the Court of Appeals for the Ninth Circuit for an order dismissing the appeal (R. 60, 62). The motion was argued on February 4, 1952, and on February 25, 1952, the Court of Appeals for the Ninth Circuit entered its order dismissing the appeal (R. 79) and on April 2, 1952, entered its order denying the petition for rehearing (R. 123).

On January 28, 1952, petitioner having failed to docket the appeal in the Court of Appeals within the forty days specified by Rule 73(g) and having failed to apply for or obtain within said forty days an order of the District Court extending the time for docketing, moved the Court of Appeals for an order extending the time within which the appeal could be docketed (R. 74). The court, having dismissed the appeal for failure to file the notice of appeal within the required time, apparently did not consider a decision of this motion necessary.

ARGUMENT

I.

Authorities Relieving Appellants from Failure to Comply With Non-Jurisdictional Requirements in Unique Hardship Cases Are Not in Point Because:

A. The instant case involves a complete failure to comply with a jurisdictional requirement, and

B. The hardship, if any, in the instant case is of petitioner's own making.

In support of its argument, petitioner cites:

Georgia Hardwood Lumber Company v. Compania De Navegacion, 323 U. S. 334, and

Reconstruction Finance Corporation v. Prudence Securities Advisory Group, 311 U. S. 579.

The instant case is governed by Title 28 U. S. C., Sec. 2107 and Rule 73(a) of the Federal Rules of Civil Procedure. *Georgia Hardwood Lumber Company v. Compania De Navegacion* involved neither the Statute nor the Rule. It involved an appeal in an admiralty case under a statute requiring that an appeal to a Circuit Court of Appeals must first be allowed by the trial court. The appellant filed a notice of appeal on July 12, 1943, which was treated by the District Court as an application for allowance of the appeal which allowance was granted by that court more than three months after the entry of the judgment appealed from. The Circuit Court of Appeals held that the District Court acted within its discretion in treating the notice of appeal as an application for the allowance of an appeal. This Court affirmed, holding that the court below acted within its discretion because merely a procedural irregularity was involved.

In *Reconstruction Finance Corporation v. Prudence Securities Advisory Group,* 311 U. S. 579, a bankruptcy case, in which the Federal Rules of Civil Procedure and Title 28 U. S. C., Sec. 2107 were not involved, the appellants in reliance upon a decision of the Circuit Court of Appeals filed notices of appeal instead of applying to the appellate court for allowance of the appeals. After the cases had been argued and were awaiting decision, the Supreme Court in another case decided that appeals of the character involved must first be allowed by the Circuit Court of Appeals. The pending appeals were therefore dismissed by the Circuit Court of Appeals. This Court reversed on the ground that the statutory requirement that appeals "be taken to and allowed by the Circuit Court of Appeals" within a prescribed time was satisfied where the application was timely, but the allowance of the appeal came later. In other words, it was held that the timely allowance of the appeal was not jurisdictional, the notice of appeal having been filed within the required time and in view of the hardship brought about by the overruling of the prior Circuit Court of Appeal's decision, the irregularity in procedure should be overlooked.

Under Title 28 U. S. C., Sec. 2107 and Rule 73(a) of the Federal Rules of Civil Procedure, the filing of a notice of appeal in the instant case within thirty days after the entry of judgment is a jurisdictional requirement. *Federal Deposit Insurance Corp. v. Congregation, etc.,* 159 Fed. (2d) 163 (C. A. 2, 1946); *Morrow v. Wood,* 126 Fed. (2d) 1021 (C. A. 5, 1942); *Marten v. Hess,* 176 Fed. (2d) 834 (C. A. 6, 1949); *Ray v. Morris,* 170 Fed. (2d) 498 (C. A. 7, 1948); *St. Luke's Hospital v. Melin,* 172 Fed. (2d) 532 (C. A. 8, 1949); *Colvin v. Woods,* 180 Fed. (2d) 893 (C. A. 9, 1950); *Roberts ex rel. In-*

mates of the California State Prison v. State of California, Department of Corrections, 183 Fed. (2d) 580 (C. A. 9, 1950).

The fact that the notice of appeal was not filed because petitioner did not pay the filing fee does not entitle petitioner to special consideration since it is well settled that the Clerk was within his rights in refusing to file the notice of appeal until the filing fee was paid. *Steever v. Rickman,* 109 U. S. 74; *Smith v. Johnston,* 109 Fed. (2d) 152 (C. A. 9, 1940); *Turkett v. United States,* 76 Fed. Supp. 769; *Oil Well Supply Co. v. Wickwire,* 52 Fed. Supp. 921; *Ommen v. Talcott,* 180 Fed. 925.

Petitioner attempts to lay the blame for its predicament on the Clerk's alleged failure to give prompt notice to counsel that payment of the filing fee was required. This entire matter has already been adjudicated by the trial court in its order of January 25, 1952 (R. 49), in which the court denied petitioner's motion to compel the Clerk to file petitioner's notice of appeal as of December 3, 1951, rather than December 12, 1951 (R. 35). No appeal has ever been taken by petitioner from this order.

Moreover, the circumstances here indicate that it was not the Clerk who was at fault. Petitioner had local counsel at Helena, Montana, which is not far from the Clerk's office at Great Falls, Montana. It would appear that the case was of sufficient importance to petitioner so that the notice of appeal should have been sent to petitioner's Montana counsel for filing. If petitioner did not choose to adopt that course, counsel could have communicated with the Clerk to find out whether a filing fee was needed and to find out whether the notice of appeal had been properly filed. A telephone call or a telegram would have sufficed. Counsel took neither

course. The notice of appeal was mailed from Los Angeles to the Clerk with no indication that a copy of the transmittal letter had been sent to petitioner's Montana counsel. Thereafter apparently the matter was forgotten until it was too late to pay the filing fee. After failing to file the notice of appeal on time and after its motion for an order nunc pro tunc was denied by the District Court, petitioner further neglected either to obtain an extension of time within which to docket the appeal or to docket the appeal within the forty days required by Rule 73(g). In an effort to avoid the consequences of its further carelessness, petitioner made a motion to the Court of Appeals to extend the time for docketing the appeal, which motion has not been decided. No adequate explanation for failure to docket or obtain an extension of time is shown in the motion (R. 74-76). The court having dismissed the appeal for failure to file a notice of appeal within the required time apparently did not consider a decision of this motion necessary. An application of the uniform rules applied by the court in similar circumstances would have required a dismissal of the appeal because of the unexcused failure to docket. *United States v. Consolidated Freightways, Inc.*, 178 Fed. (2d) 756; *United States v. Stanton*, 172 Fed. (2d) 642; *National Union v. Matson Navigation Co.*, 171 Fed. (2d) 179; *Tucker Products Co. v. Helms*, 171 Fed. (2d) 126.

Petitioner urges that counsel was misled by the terminology of Title 28 U. S. C. A., Sec. 1914 and therefore did not discover the requirement for a filing fee in Title 28 U. S. C. A. 1917. We know of no basis for giving the general provisions of Section 1914 priority over the specific provisions of Section 1917.

II.

There Is No Conflict With Decisions of the Court of Appeals of Another Circuit.

Petitioner contends that the decision of the Court of Appeals for the Ninth Circuit in the instant case is in conflict with the decisions of the Court of Appeals for the Fifth Circuit in *Crump v. Hill,* 104 Fed. (2d) 36, and *Compania De Navegacion v. Georgia Hardwood Lumber Company,* 141 Fed. (2d) 652.

The decision in the instant case is based upon Title 28 U. S. C., Section 2107 and Rule 73(a) of the Federal Rules of Civil Procedure and decisions under that Statute and Rule holding that the timely filing of a notice of appeal is an absolute jurisdictional requirement. *Compania De Navegacion v. Georgia Hardwood Lumber Company,* supra, did not involve either the Statute or the Rule. It was an admiralty case. Subsequent to the decision therein, the Court of Appeals for the Fifth Circuit in *Lamb v. Shasta Oil Co.,* 149 Fed. (2d) 729, a case under Title 28 U. S. C., Sec. 2107 and Rule 73(a), dismissed an appeal because of failure to file the notice of appeal within the time prescribed by the Statute and Rule. The opinion states:

> "The time limit as to appeals to this Court is jurisdictional and cannot be extended by waiver or consent of the parties or even by order of the Court. It is well settled that the filing of notice of appeal within 90 days after entry of judgment is mandatory, and since the notice of appeal from the summary judgment was not given within three months after June 1, 1942, this Court is without jurisdiction to consider the appeal."
> (p. 730)

Petitioner contends that *Crump v. Hill,* 104 Fed. (2d) 36 is authority for the proposition that substantial com-

pliance with the requirements of Title 28 U. S. C., Sec. 2107 and Rule 73(a) is sufficient and that in the instant case, petitioner's Statement of Points and Designation of Record filed on December 8th is a sufficient compliance with those requirements.

An analysis of *Crump v. Hill,* supra, indicates that the case does not support petitioner's argument. In that case the time for the filing of a notice of appeal was 90 days from the entry of the judgment. Within the 90-day period, the following had occurred:

(1) The attorney for the appellee had signed a waiver of service of the notice of appeal and an entry of appearance in the following language:

> "I, F. H. Montgomery, of Counsel for Appellee, Mrs. Ivy G. Hill, defendant in the Court below, hereby acknowledge service of notice of appeal and designation of record. I hereby and herewith enter the appearance of the said Mrs. Ivy G. Hill in all respects as if she had been formally served with notice of appeal and Appellant's designation of record hereby waiving formal service of said papers.
>
> "Witness my signature this 22nd day of December, 1938.
>
> F. H. Montgomery."

(See pp. 18 and 19—record in *Crump v. Hill,* a certified copy of which has been filed with this brief.)

(2) This waiver of service and entry of appearance had been filed in the office of the Clerk of the District Court.

(3) The appellee had filed in the office of the District Court its Designation of Record on appeal.

The Court held that this was the complete equivalent of the filing of a notice of appeal. There is no such "complete equivalent" of filing a notice of appeal in the instant case. Within the requisite 30-day period, nothing to which the appellee was a party had been filed. The appellee did not waive the service of the notice, it did not enter its appearance, and it did not file a Designation of Record.

Petitioner urges upon the Court that its Statement of Points and Designation of Record be considered a notice of appeal. This instrument does not comply with the requirements for a notice of appeal specified in Rule 73(b) of the Federal Rules of Civil Procedure, which provides:

> "The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken."

Petitioner's Statement of Points and Designation of Record does not "designate the judgment or part thereof appealed from". It would appear from its context that it is directed to the Opinion and Order of November 1, 1951, but it was filed 38 days after the entry of that Opinion and Order. The Statement of Points and Designation of Record does not name the court to which the appeal is taken. Moreover, the Statement of Points and Designation of Record was not considered a notice of appeal either by petitioner or by the Clerk. Prior to the filing of that document a notice of appeal had been submitted and not filed because of the failure to pay the filing fee. Had the Statement of Points and Designation of Record been offered as a notice of appeal or considered as such by the Clerk, it would not have been filed because of the failure to pay the filing fee. The notice of

appeal itself was received by the Clerk, though not filed by him, 33 days after the entry of the Opinion and Order of the Court, and was filed 42 days after the Opinion and Order, and 34 days after the formal judgment.

Subsequent to the decision in *Crump v. Hill,* supra, the Circuit Court of Appeals for the Fifth Circuit in *Morrow v. Wood,* 126 Fed. (2d) 1021, had before it a case which is closely analogous to the instant case. In that case, within the three months following the entry of judgment (that being the appeal period then applicable) appellant had filed a transcript, praecipe, supersedeas bond and designation of record. The notice of appeal was filed after the three months' period had expired. Appellant, *as in the instant case,* failed either to file and docket the appeal within the time required by Rule 73(g) of the Federal Rules of Civil Procedure, or to apply for or obtain an extension of time. The Court dismissed the appeal. It said:

> "An appeal must be taken within three months after the entry of judgment in the district court. This requirement is mandatory and jurisdictional. * * *
>
> "* * * The timely filing of the notice of appeal is a vital step in the perfection of an appeal. Appellants failed to comply with this requirement and the case is not properly before us. * * *
>
> "Aside from this, however, if, as appellants contend, the proceedings that were taken constituted such substantial compliance with law as to give this court jurisdiction to entertain the appeal, we think the appeal should be dismissed for failure to comply with Rule 73(g) of the Rules of Civil Procedure, and the rules of this court. Cf. Crump v. Hill, supra. The last of the series of steps relied upon by appellants as perfecting the appeal was taken on December 12, 1941. Under any view of the case the transcript of record was required to be

filed and docketed in this court within forty days thereafter. The record was not filed and docketed within that time, nor was an extension of time applied for or granted. Cf. Brennan v. United Fruit Co., 5 Cir., 108 F. 2d 710."
(p. 1022)

It is apparent that there is no conflict between the decision in the instant case and the decisions of the Court of Appeals for the Fifth Circuit. Both Courts hold that the filing of the notice of appeal within the requisite time is a mandatory jurisdictional requirement. Both Courts have dismissed cases under the circumstances here involved for failure to comply with that requirement.

III.

The Decisions of the Court of Appeals for the Ninth Circuit Are Not in Conflict.

Petitioner seeks to show that the decision in the instant case, a Ninth Circuit decision, is in conflict with the decision of that court in *Cutting v. Bullerdick,* 178 Fed. (2d) 774, and *St. Marie v. United States,* 108 Fed. (2d) 876. *Cutting v. Bullerd'ck* obviously is not in conflict with the decision in the instant case because it involved neither Title 28 U. S. C., Sec. 2107 nor Rule 73(a) of the Federal Rules of Civil Procedure. It was an appeal from the Territory of Alaska, as to which neither the Statute nor the Rule were applicable. The case was a "hardship case" because of the fact that at the time it was decided the practice for the Territory of Alaska was in doubt.

St. Marie v. United States, 108 Fed. (2d) 876 involves a wholly different situation. There the notice of appeal which was filed was by one appellant "for herself

and for those similarly situated". A motion was made to dismiss the appeal of all parties except the appellant who filed the petition on the ground that the cases, although consolidated for trial, required separate appeals. The Court said:

> "The notice of appeal complies with the Rule. While we think it would be better practice to file a notice of appeal in each case, it is apparent that notice of appeal was effectively given, which, after all, is the purpose of the Rule."
> (p. 880).

Subsequent to the decisions in *Cutting v. Bullerdick* and *St. Marie v. United States,* the Court of Appeals for the Ninth Circuit in *Roberts ex rel. Inmates of the California State Prison v. State of California*, 183 Fed. (2d) 580 and *Colvin v. Woods,* 180 Fed. (2d) 893 both of which were decided under Title 28 U. S. C. Sec. 2107 and Rule 73(a), dismissed appeals for failure to file the notice of appeal within the requisite 30-day period. In the latter case, the motion was granted although the notice of appeal was filed only one day too late. It is therefore obvious that there is no conflict in the decisions of the Court of Appeals for the Ninth Circuit.

IV.

Petitioner Filed Nothing Within Thirty Days After the Entry of the Opinion and Order of the District Court of November 1, 1951.

The Order of November 1, 1951, is a judgment. It effectively disposed of the entire proceeding. Its concluding statement is:

> "in the opinion of the court the defendant's motion should be granted and the action dismissed and such is the order of the court herein" (R. p. 32).

This constitutes the judgment from which the appeal should be taken. *Steccone v. Morse-Starrett Products Co.*, 191 Fed. (2d) 197 (C. A. 9, 1951); *In re Forstner Chain Corporation*, 177 Fed. (2d) 572 (C. A. 1, 1949); *Wood v. Nicholas*, 163 Fed. (2d) 615 (C. A. 10, 1947); *Haddock v. Pillsbury*, 155 Fed. (2d) 820 (C. A. 9, 1946) (certiorari denied, 329 U. S. 719); and *Liberty Mutual Insurance Company v. Pillsbury*, 154 Fed. (2d) 559 (C. A. 9, 1946) (certiorari denied 329 U. S. 717).

Petitioner filed nothing in the office of the Clerk of the District Court until its Statement of Points and Designation of Record were filed on December 8, 1951, thirty-eight days after the entry of the Opinion and Order. Respondent's motion to dismiss the appeal was based upon the failure to file the notice of appeal within thirty days after the entry of the Opinion and Order, as well as upon petitioner's failure to file the notice of appeal within thirty days after the formal judgment of November 8, 1951 (R. 62).

CONCLUSION

The decision in the instant case is not one which conflicts with decisions of this Court or of any Court of Appeals. It is not a hardship case. It is not a case of general interest. It is a case which obviously should have been dismissed. The Court's order of dismissal was on jurisdictional grounds. It could have dismissed the case on discretionary grounds by denying the motion which was before it to extend the time to file and docket the appeal. The record shows that there was no meritorious excuse for petitioner's failure.

The rule governing time for appeal has been uniformly applied by the Courts of Appeals for the various circuits. To sustain petitioner's position would obscure

and unsettle this procedure so that neither the lower courts nor litigants could find any certainty therein.

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

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